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No. 00-1322

IN THE

Supreme Court of the United States

JEANNE WOODFORD, Warden,
California State Prison at San Quentin,

Petitioner,

vs.

BRUCE WAYNE MORRIS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the diligence standard of *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1 (1992) and *Williams* v. *Taylor*, 529 U. S. 420 (2000) apply when the prisoner's state habeas petition and request for an evidentiary hearing were dismissed by the state court on alternate state grounds when the federal circuit court holds that one of these grounds is not independent from federal law?

2. Is a prisoner entitled to an evidentiary hearing merely because he raised a 'colorable' claim even though the District Court issued an undisturbed finding that the prisoner failed to produce any evidence in state or federal court of any genuine issues of material fact?

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation[1] respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in this case. Counsel for petitioner has consented, but counsel for respondent has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The requirement that a federal habeas petitioner must be diligent in establishing an evidentiary basis for his claims in state court before being entitled to an evidentiary hearing in federal court plays an important role in protecting the integrity of state court convictions. The Ninth Circuit's refusal to apply this rule to this case threatens to turn federal habeas corpus into a forum for relitigating state convictions. This attack on comity, federalism, and finality is contrary to the rights of victims and society which the CJLF was formed to advance.

For the foregoing reasons, *amicus* requests leave to file its brief.

May, 2001

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS AND CASE

On September 11 or 12, Rickey Van Zandt picked up Bruce Morris, the habeas petitioner in this case, and two female companions who were hitchhiking from Sacramento, California, to the north shore of Lake Tahoe. See *People* v. *Morris*, 53 Cal. 3d 152, 176, 807 P. 2d 949, 959 (1991). During the trip, Morris decided to stab Van Zandt in the back and take the van. *Ibid.* When the opportunity presented itself, Morris attacked Van Zandt with a rock, hitting him on the head 13 times. *Id.*, at 177, 807 P. 2d, at 960. He dragged Van Zandt from the van and rolled him down a slope. At this time, Van Zandt "was moaning; blood and brain fluids oozed from his head." *Ibid.* Van Zandt was still moaning when they reached the bottom of the slope. Morris then "picked up a stick, lifted it over his head, told Van Zandt that he was sorry, and hit him on the back

of the head three times." *Ibid.* Van Zandt's dead body was found "on September 17, five or six days after he was left on the slope." *Ibid.*

On June 22, 1987, Morris was found guilty of first-degree robbery and murder with the special circumstance that the murder was committed in the course of a robbery. See *Morris* v. *Woodford*, 229 F. 3d 775, 777 (CA9 2000). He was subsequently sentenced to death. See *ibid.* On September 7, 1990, the California Supreme Court denied his first state habeas corpus petition and affirmed his conviction on direct review on March 28, 1991. *Id.*, at 777-778.

Morris filed his first federal habeas petition on June 15, 1993. See *id.*, at 778. The District Court partially granted California's motion to dismiss on exhaustion grounds, while staying the case to allow the petitioner to exhaust his state remedies. *Ibid.* Over the next one and one-half years, the District Court paid $94,927.92 in pre-petition investigative fees to appointed counsel. See Pet. for Cert. 3. On December 1, 1995, Morris filed a second state habeas petition, which included claims of ineffective assistance of counsel and incompetency to aid counsel. See *ibid.* In this petition, Morris requested discovery and an evidentiary hearing for his ineffective assistance of counsel and incompetency claims, but gave no evidentiary support for these claims. *Ibid.* On December 5, 1995, the California Supreme Court denied the petition in the following order:

> "The petition for writ of habeas corpus, filed on December 1, 1995, is denied. All claims are based on information that was long known or should have been known to petitioner or his counsel and could have been raised in petitioner's earlier habeas corpus petition; petitioner fails to allege with particularity any fact not earlier known to petitioner. No sufficient justification has been offered to explain the delay or the successive petition, and no fundamental miscarriage of justice has been demonstrated to excuse either. (See Supreme Court Policies Regarding

> Cases Arising From Judgments of Death, std. 1-1.2; *In re Clark* (1993) 5 Cal.4th 750, 767-782 [successive petitions], 783-787 [delay], 797-798 [exceptions].) Accordingly, the petition is denied as untimely. It is also denied on the merits. (See *Harris* v. *Reed* (1989) 489 U. S. 255, 264, fn. 10.)" California Supreme Court Minutes 3 (Dec. 6, 1995).

Morris filed an amended federal petition, the subject of the present case, on January 17, 1996. *Morris*, 229 F. 3d, at 778. The District Court dismissed as procedurally barred all of petitioner's claims raised in the second state petition and several other claims, while granting California's motion for summary judgment on all the other claims. *Ibid.* The District Court also held that the procedurally barred claims were meritless. See Pet. for Cert. 4.

The Ninth Circuit vacated the District Court's opinion and remanded the case for an evidentiary hearing on the ineffective assistance of counsel and incompetency claims. See *Morris*, 229 F. 3d, at 781-782. It held that *In re Clark*, 5 Cal. 4th 750, 855 P. 2d 729 (1993), was not an adequate and independent state law ground, see *Morris*, *supra*, at 780, and that because there was no evidentiary hearing on the second state habeas petition, the prisoner was entitled to an evidentiary hearing on these claims in federal court. See *id.*, at 781. No other justification was given for this holding. See *ibid.* On November 16, 2000, the Ninth Circuit denied California's motion for a rehearing en banc.

SUMMARY OF ARGUMENT

Under California law, the prisoner must attach all relevant supporting materials to the habeas petition. California courts summarily dismiss petitions without supporting materials. The California Supreme Court's dismissal of the second habeas petition without an evidentiary hearing was a proper decision

on the merits of the case, in that the habeas petitioner had failed to substantiate the factual basis of his claims.

The diligence standard of *Keeney* v. *Tamayo-Reyes* is a threshold requirement separate from its cause and prejudice test. As explained in *Williams* v. *Taylor*, the diligence inquiry is always made first whenever there has been a failure to develop evidence in state court. A prisoner who has not been diligent must then meet a heightened standard before being entitled to an evidentiary hearing. The Ninth Circuit's failure to follow this process contradicts *Keeney*. This also contradicts the practices of other circuits, and even other Ninth Circuit decisions.

The conflict between *Keeney* and circuit precedent deserves this Court's attention. While *Williams* provided some guidance on what constituted sufficient diligence, it did not deal with the relationship between diligence and state procedural defaults found in this case. The diligence standard is an important limit on the relitigation of state criminal convictions in federal court. Because this case can serve as an important bookend to *Williams*, certiorari should be granted.

ARGUMENT

The Ninth Circuit's decision in this case provides two independently sufficient grounds for this Court to exercise its certiorari jurisdiction: the improper failure to apply the diligence standard of *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1 (1992) and the decision's apparent failure to follow summary judgment procedure when confronted with habeas claims that involved no substantial factual dispute. *Amicus* will focus its attention on the *Keeney* issue. *Keeney*'s diligence standard is still an integral part of habeas procedure, now codified in 28

U. S. C. § 2254(e)(2).[1] The Ninth Circuit's failure to apply this standard to the prisoner's demand for an evidentiary hearing establishes precedent that conflicts with this Court's decisions, and the practices of other circuits.

I. The decision conflicts with *Keeney*'s diligence standard.

The Ninth Circuit's treatment of the evidentiary hearing question provides two grounds for granting certiorari. First, the decision contradicts these cases, thus deciding "an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c). Additionally, its treatment of the diligence requirement is contrary to the treatment by other circuits, creating a "conflict with the decision of another United States court of appeals on the same important matter . . . ." Supreme Court Rule 10(a). In this portion of the brief, *amicus* highlights the conflict. In part II, *infra*, *amicus* demonstrates the importance of resolving the conflict.

A. The Diligence Requirement.

This case's importance begins with an understanding of California's habeas procedure. In this case, the prisoner's second habeas petition included no supporting material for his claims. See Pet. for Cert. 3. The California Supreme Court's summary dismissal of the second petition was a consequence of the lack of evidentiary support for the petition, and therefore

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1. The Ninth Circuit's departure from the summary judgment procedure of *Blackledge* v. *Allison*, 431 U. S. 63, 80 (1977) also justifies certiorari review. California ably demonstrates that summary judgment is an important tool for the speedy resolution of habeas petitions. The Ninth Circuit decision is incompatible with this Court's summary judgment cases. It rewards the petitioner for withholding information from state and federal court. See Pet. for Cert. 11-16.

this case cannot be distinguished from *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1 (1992).

A habeas petitioner in California courts has a "burden of pleading adequate grounds for relief . . . ." *People* v. *Duvall*, 9 Cal. 4th 464, 474, 886 P. 2d 1252, 1258 (1995). Therefore, the habeas "petition should both (i) state fully and with particularity the facts on which relief is sought, as well as (ii) include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations." *Ibid.* (citations omitted). *Duvall* was decided in January 1995, nearly eleven months before the prisoner submitted his second state petition. The *Duvall* decision did not state any new principles of California habeas procedure. "Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, *let alone an evidentiary hearing*." *People* v. *Karis*, 46 Cal. 3d 612, 656, 758 P. 2d 1189, 1216 (1988) (emphasis added).

These requirements were well known to California practitioners when Morris's counsel filed the second petition. "Furthermore, all relevant records and other evidence necessary to establish a right to relief must be attached to the pleadings as supporting exhibits or lodged with the court." D. Fischer & R. Lynn, Appeals and Writs in Criminal Cases § 2.136, p. 313 (Cal. Cont. Ed. Bar 1982). As the leading authority on California procedure explained:

> "Frequently, the petition is treated as a 'traverse' or answer to the return and as the entire showing of the petitioner, without any further pleading or supporting papers (see infra, § 3377). Hence, *unless he attaches to his petition copies of the relevant records or other documentary evidence supporting his claim of illegal restraint, it may be summarily denied.* (See *In re Kolbe* (1934) 139 C.A. 239, 240, 33 P.2d 840 [claim of commitment without probable cause; transcript of preliminary hearing not brought up]; *Matter of Crowley* (1915) 171 C. 58, 59, 151 P. 739 [claim of arrest under invalid ordinance; neither copy of ordinance nor

> complaint furnished]; *In re Jackson* (1939) 33 C.A.2d 724, 92 P.2d 951 [same, claim of conviction]; *In re Swain* (1949) 34 C.2d 300, 302, 209 P.2d 793 [claim of conviction on perjured testimony knowingly used; testimony not quoted or otherwise specifically designated].)" 6 B. Witkin & N. Epstein, California Criminal Law § 3360, p. 4170 (2d ed. 1989) (emphasis added).[2]

Thus, long-established California law gave habeas petitioners, including Morris, clear notice that they needed to attach the relevant supporting materials to avoid a dismissal and obtain an evidentiary hearing. The state court's dismissal on the merits without a hearing, as an alternative holding to its untimeliness and successive petition grounds, was correct under well-established law. Morris's failure to attach the materials constitutes a failure to develop the facts in state court within the meaning of *Keeney* and *Williams* v. *Taylor*, 529 U. S. 420 (2000).

B. Contradicting Keeney.

The Ninth Circuit's decision conflicts with the diligence standard of *Keeney* v. *Tamayo-Reyes*, *supra*, and *Williams*, *supra*. The analysis of a habeas petitioner's claim to an evidentiary hearing is split into two parts under *Keeney* and *Williams*. First, the court must determine whether the petitioner acted diligently in developing the facts supporting his claims in state court. If the petitioner was not diligent, then the court makes a separate inquiry into whether the fault is excused. "As is evident from the similarity between the Court's phrasing in *Keeney* and the opening clause of § 2254(e)(2), Congress

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2. *Amicus* quotes from the editions of the above treatises that were available when the second state habeas petition was being prepared. The current editions of both treatises state the same rule. See 1 D. Fischer, et al., Appeals and Writs in Criminal Cases § 2.188, p. 392 (2d ed. 2000); 6 B. Witkin & N. Epstein, California Criminal Law, Criminal Writs § 56, pp. 590-591 (3d ed. 2000).

intended to preserve at least one aspect of *Keeney*'s holding: habeas petitioners who are at fault for the deficiency in the state-court record must satisfy a heightened standard to obtain an evidentiary hearing." *Williams*, 529 U. S., at 433. This is a diligence standard. See *id.*, at 432; *Keeney*, 504 U. S., at 8 ("petitioner's negligent failure to develop facts"). Diligence is thus separate from the cause and prejudice test or § 2254(e)(2)'s more stringent requirements. "To be sure, in requiring that prisoners who have not been diligent satisfy § 2254(e)(2)'s provisions rather than show cause and prejudice, . . . Congress raised the bar *Keeney* imposed on prisoners who were not diligent in state-court proceedings." *Williams*, 529 U. S., at 433. While § 2254(e)(2)'s excuse standard is more difficult for the prisoner to meet than *Keeney*'s cause and prejudice test, the initial requirement that the prisoner was diligent in state court remains the same. See *ibid.* Whenever a petitioner asserts an entitlement to a federal evidentiary hearing, the federal habeas court must first determine whether the petitioner was diligent.

Although the Ninth Circuit mentioned *Keeney*, it did not apply the decision.

> "The state argues that the lack of a factual record is Petitioner's fault and that Petitioner's failure to provide more factual support for his claims militates against granting an evidentiary hearing. We agree that a petitioner who negligently fails to develop the material facts supporting a claim at the state-court level generally is not entitled to a federal evidentiary hearing. *See Keeney v. Tamayo-Reyes*, 504 U. S. 1, 11, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992); *Correll v. Stewart*, 137 F.3d 1404, 1413 (9th Cir. 1998). But here, as in *Correll* and *Siripongs* [v. *Calderon*, 35 F. 3d 1308 (CA9 1994)], Petitioner did not receive an evidentiary hearing in state court, either; indeed, his second state-court petition was denied only five days after it was filed. Thus, he has not received an evidentiary hearing on these claims at any level. In the circumstances, we will not address the merits of Petitioner's claims of incompetence

> and ineffective assistance of counsel without giving him an opportunity for an evidentiary hearing." *Morris* v. *Woodford*, 229 F. 3d 775, 781 (CA9 2000).

This passage does not come to grips with the fact that the state court dismissed on the alternative grounds of the merits as well as on procedural default. See *infra*, at 13-14. The state petition lacked merit because of its failure to substantiate the factual basis of the claims.

The diligence standard is not limited to cases where the prisoner actually received an evidentiary hearing in state court. Whenever a fact was not developed in state court, a federal court must first determine whether the prisoner was at fault for the failure. "Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court *in the manner prescribed by state law*." *Williams*, 529 U. S., at 437 (emphasis added). The prisoner did not do this in this case and was therefore properly denied an evidentiary hearing by the California Supreme Court. See part I A, *supra*.

> "For state courts to have their rightful opportunity to adjudicate federal rights, the prisoner must be diligent in developing the record and presenting, if possible, all claims of constitutional error. . . . Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." *Williams*, *supra*, at 437.

The Ninth Circuit did not apply this standard to the present case.

It is clear that the Ninth Circuit has disregarded *Keeney*. Conflict between the decision of a circuit court and one of this Court's precedents provides a strong reason for granting certiorari. See, *e.g.*, *United States* v. *Doe*, 465 U. S. 605, 610 (1984); *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 926 (1982); *Army & Air Force Exchange Service* v. *Sheehan*, 456 U. S. 728, 733 (1982). That conflict is highlighted by how

differently the diligence standard is treated in other circuits and even in other Ninth Circuit decisions.

C. Contradicting Circuits.

In addition to being contrary to *Keeney*, the approach taken by the Ninth Circuit in this case is also inconsistent with other circuits' approaches to the diligence standard. Decisions in other circuits demonstrate that the habeas petitioner must explain why the facts were not developed in a state hearing or lose the right to a federal evidentiary hearing. Sometimes this involves a fairly detailed analysis of the relevant state court procedures for developing evidence and how the petitioner utilized these procedures in the state court. For example, in *Byrd* v. *Collins*, 209 F. 3d 486 (CA6 2000), the circuit court began its analysis of the *Keeney* issue with a thorough description of the Ohio procedure for holding post-conviction evidentiary hearings. See *id.*, at 512-513. After determining that the petitioner did not avail himself of the many opportunities to develop his case in the Ohio courts, see *id.*, at 513-514, the court came to the only conclusion allowed by *Keeney*, that he was not entitled to an evidentiary hearing in federal court. See *id.*, at 516. "To hold otherwise in Petitioner's case would not only be contrary to well-settled law, but would also establish a blueprint for delay by other capital defendants." *Ibid.* Similarly detailed analysis is also found in *Hill* v. *Jones*, 81 F. 3d 1015 (CA11 1996), in which the court undertook a detailed examination of Alabama procedure before determining that because the underlying claim was procedurally defaulted, the petitioner was not entitled to a federal evidentiary hearing. See *id.*, at 1022-1026. Yet another example of this is *Dowthitt* v. *Johnson*, 230 F. 3d 733, 758 (CA8 2000), where the filing of a request for a state evidentiary hearing was not enough to establish diligence. The prisoner's failure to provide affidavits to support his request demonstrated insufficient diligence, see *ibid.*, a situation no different from the present case. See *ibid.* ("mere requests for an evidentiary hearing will not suffice; the

petitioner must be diligent in pursuing the factual developments of his claim").

Other circuits also follow *Keeney*'s dictate that the habeas petitioner must justify why the facts were not developed in the state court before being entitled to a federal evidentiary hearing. These decisions typically dismiss the petitioner's request in a summary fashion, while noting the failure to carry the burden of justification. See, *e.g.*, *Morris* v. *Dormire*, 217 F. 3d 556, 560 (CA8 2000) ("no attempt to satisfy the statutory requirements"); *Valdez* v. *Ward*, 219 F. 3d 1222, 1230 (CA10 2000) (failure to request a hearing in state court); *Flamer* v. *Delaware*, 68 F. 3d 710, 735, n. 24 (CA3 1995). The decisions of these and other circuits demonstrate the habeas petitioner's heavy burden of explaining undeveloped facts. "Absent extraordinary circumstances, a habeas petitioner may not seek an evidentiary hearing on the basis of records that were available to him during the state court's proceedings but that he did not present." *Flamer*, *supra*, at 735, n. 24. The decision in this case contradicts all of these decisions by failing to require diligence on the part of the petitioner in seeking an evidentiary hearing in the California courts.

Even other Ninth Circuit decisions recognize that the habeas petitioner must explain why an evidentiary hearing was not conducted in the state courts. For example, in *Baja* v. *Ducharme*, 187 F. 3d 1075 (CA9 1999), because "Baja has not explained why the evidence needed to support" his claim was not developed at the state level, he was not entitled to a federal evidentiary hearing. *Id.*, at 1079. Similarly, in *Bragg* v. *Galaza*, 242 F. 3d 1082 (CA9 2001), the prisoner's failure to file a state habeas petition kept him from developing the factual record for his ineffective assistance of counsel claim, thus preventing him from receiving a federal evidentiary hearing. See *id.*, at 1089. The inability to explain the lack of a state hearing meant that the petitioner did not demonstrate the necessary diligence to be entitled to a federal hearing. See *ibid.* Although intracircuit conflict is usually best resolved within the

conflicted circuit, see *Davis* v. *United States*, 417 U. S. 333, 340 (1974), this option was foreclosed in this case, as the Ninth Circuit denied en banc review. See *supra*, at 3. Since this case involves recurring and important issues, see part II, *infra*, and conflicts with the decisions of other circuits, the intracircuit conflict provides an additional reason to grant certiorari. See *John Hancock Mut. Life Ins. Co.* v. *Bartels*, 308 U. S. 180, 181 (1939).

II. This case presents important issues that deserve this Court's attention.

This case raises issues concerning the proper administration of the diligence standard of *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1 (1992) and *Williams* v. *Taylor*, 529 U. S. 420 (2000) that justify a grant of certiorari in this case. This standard is an important asset for preserving the finality of state convictions because "requiring a federal evidentiary hearing solely on the basis of a habeas petitioner's negligent failure to develop facts in state-court proceedings, dramatically increases the opportunities to relitigate a conviction." *Keeney*, 504 U. S., at 8-9. While this Court did provide some guidance on what constitutes sufficient diligence in *Williams*, see 529 U. S., at 438-444, it is not enough. There remain important issues about the relationship between diligence and state procedures that this Court should address.

Determining whether a prisoner has cause for failing to develop facts in state court can pose difficult questions. See *Davis* v. *Zant*, 36 F. 3d 1538, 1544 (CA11 1994). One particularly important issue that this case may illuminate is the role state procedural rules play in determining whether the prisoner has cause for not developing evidence in the state courts. Since the *Keeney* standard is derived from the same concerns that motivated this Court's procedural default cases, see 504 U. S., at 8, state rules governing the post-conviction development of evidence should be respected. "Diligence will require in the

usual case that the prisoner, *at a minimum*, seek an evidentiary hearing in state court in the manner prescribed by state law." *Williams*, 529 U. S., at 437 (emphasis added). However, *Williams* did not address this issue; that case dealt with evidentiary issues that the petitioner could not reasonably expect to discover until after the state post-conviction litigation had ended. See *id.*, at 440-442.

This case can be an important bookend to *Williams*. The claims for which the Ninth Circuit granted an evidentiary hearing were rejected as procedurally defaulted by the California Supreme Court. See *supra*, at 2. Although the panel in this case gave no real reason for granting an evidentiary hearing, the only possible justification would seem to be its holding that the relevant California procedural default rule, *In re Clark*, 5 Cal. 4th 750, 855 P. 2d 729 (1993), was "*not* an independent and adequate state-law ground." *Morris* v. *Woodford*, 229 F. 3d 775, 780 (CA9 2000) (emphasis in original). The fact that there was no evidentiary hearing is not enough by itself to distinguish *Keeney* under Ninth Circuit precedent; other Ninth Circuit decisions require the petitioner to explain why there was no evidentiary hearing in state court, or satisfy the exceptions to *Keeney* and *Williams*. See *supra*, at 11. Therefore, the decision in this case is best explained by the Ninth Circuit's refusal to recognize *Clark*'s procedural bar.

The Ninth Circuit's decision did not acknowledge that there was an alternative ground for dismissing the petition without an evidentiary hearing. As explained in part I A, *supra*, Morris contravened the California rule requiring habeas petitions to be accompanied by all materials necessary to support his claim, which results in a dismissal of the habeas petition without an evidentiary hearing. In federal procedure, this would be equivalent to a plaintiff's failure to provide the factual basis to resist a summary judgment motion. See Fed. Rule Civ. Proc. 56(e). The California Supreme Court's dismissal on the merits as an alternate ground to *Clark* reflects this situation. Because Morris did not meet his evidentiary burden, his petition was

dismissed on the merits without an evidentiary hearing. See *supra*, at 7. *Keeney* is tailor-made for this type of case.

To hold that *Keeney* does not apply because the petition is also barred by other procedural rules creates a perverse result. Had Morris not violated the *Clark* rules, then the Ninth Circuit would have no grounds for distinguishing *Keeney*. Yet this seems to be the implication of the Ninth Circuit's decision. In addition to giving California prisoners an incentive to violate state procedural default rules, this result also contradicts the rule of *Harris* v. *Reed*, 489 U. S. 255 (1989), that alternative holdings do not give up the force of either ground under the adequate and independent state ground doctrine. See *id.*, at 264, n. 10. This anomalous result should not stand unexamined.

This case demonstrates that *Keeney* and *Williams* raise important, unresolved issues about the relationship between state procedural rules and the requirement that a habeas petitioner must diligently develop the evidentiary support for his or her claims in state court. The Ninth Circuit's decision also shows that the federal courts need guidance on these issues. This case presents an excellent vehicle for clarifying *Keeney*'s diligence standard.

III. The Ninth Circuit's persistent failure to respect California's procedural default rules is incorrect.

In the present case, the Ninth Circuit held that California's rule on untimely petitions, *In re Clark*, 5 Cal. 4th 750, 855 P. 2d 729 (1993), is not an independent and adequate state law ground that bars federal review of claims dismissed under its rule. See *Morris* v. *Woodford*, 229 F. 3d 775, 780 (CA9 2000). This holding continues the practice of earlier Ninth Circuit decisions, declaring that California habeas rules are not independent and adequate state grounds. See *Park* v. *California*, 202 F. 3d 1146, 1153 (CA9 2000); *Fields* v. *Calderon*, 125 F. 3d 757, 765 (CA9 1997). *Fields* and *Park* address the rule

of *In re Dixon*, 41 Cal. 2d 756, 759, 264 P. 2d 513, 514 (1953), that issues which should have been raised on appeal generally are not considered on habeas. These Ninth Circuit cases declined to respect the *Dixon* rule because of the exceptions to it that had been recognized by California courts. See *Fields*, 125 F. 3d, at 764-765 ("flexible application of the *Dixon* rule"); *Park*, 202 F. 3d, at 1152-1153 (fundamental constitutional error exception to *Dixon* rule renders that rule not independent of federal law). Since *Clark* contains a similar exception, see 5 Cal. 4th, at 797, 855 P. 2d, at 760, the Ninth Circuit's decision not to respect *Clark*'s independence no doubt follows the reasoning of *Park* and *Fields*.[3]

These decisions are incorrect. Punishing a state for its generous decision to recognize exceptions to its habeas rules is an anomalous result contrary to the letter and spirit of the adequate and independent state grounds doctrine. See *McCown* v. *Callahan*, 726 F. 2d 1, 3-4 (CA1 1984) (Breyer, J.). The independent and adequate state grounds doctrine does not require states to impose rigid procedural rules. Instead, this doctrine guards against state rules that trap, mislead, or deceive the defendant into failing to assert his or her federal right at the time or in the manner which the state court later determines was the required time or the required manner. See, *e.g.*, *Ford* v. *Georgia*, 498 U. S. 411, 424 (1991) (retroactive application of new procedural rules); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 457 (1958) ("petitioner could not fairly be deemed to have been apprised of [the rule's] existence"). A more detailed analysis of the many problems with *Park* and *Fields* is in the CJLF's briefs supporting certiorari in those

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3. The court adopted the reasoning of *La Crosse* v. *Kernan*, 211 F. 3d 468 (CA9 2000) in its decision not to enforce *Clark*. See *Morris*, 229 F. 3d, at 780, n. 2. *La Crosse* applied *Park*'s reasoning to the *Clark* rule. See 211 F. 3d, at 474. While the *La Crosse* opinion was withdrawn by the Ninth Circuit, the reinstated opinion, decided after *Morris*, again declined to apply *Clark*. See *La Crosse* v. *Kernan*, No. 97-55085, 2001 Daily Journal D.A.R. 3023, 3024 (CA9, March 26, 2001).

cases. See generally Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *California* v. *Park*, No. 99-1971; Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Calderon* v. *Fields*, No. 97-1262.

Although the state has not specifically included this issue in the questions presented, *amicus* suggests that the Court may wish to consider it, either *sua sponte* or as "a 'predicate to an intelligent resolution' of the question presented, and therefore 'fairly included therein.' " *Ohio* v. *Robinette*, 519 U. S. 33, 38 (1996).

The manifestly wrong decisions in *Fields* and *Park* continue to distort habeas law in California and create unnecessary problems. The sooner they are overruled the better.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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